# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-757

FRIEDY B. HEISLER, M.D., AND
FRANCIS HEISLER, PETITIONERS

v.

UNITED STATES OF AMERICA, JOSEPH M. CULLEN,
DISTRICT DIRECTOR OF INTERNAL REVENUE, AND
RANDOLPH THROWER, COMMISSIONER OF
INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The judgment of the district court was entered without opinion upon its order granting the government's motion to dismiss. The opinion of the court of appeals (Pet. App. i-ii) is reported at 463 F. 2d 375.

### JURISDICTION

The judgment of the court of appeals was entered on June 21, 1972. By order of Mr. Justice Douglas the

time for filing a petition for a writ of certiorari was extended to November 27, 1972. The petition for a writ of certiorari was filed on November 22, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether petitioners are entitled to a deduction for a "personal" or "human" depletion allowance with respect to their ability to earn a living under Sections 611-613 of the Internal Revenue Code of 1954.

2. Whether petitioners have standing to seek a judicial declaration that the depletion allowance provisions of Sections 611-613 of the Internal Revenue Code of 1954 are unconstitutional on the ground that they do not provide for such a "personal" or "human" depletion allowance.

3. Whether a three-judge district court was required under 28 U.S.C. Section 2282 to hear and decide petitioners' claim that Sections 611-613 of the Internal Revenue Code of 1954 are unconstitutional.

## STATUTES INVOLVED

The relevant provisions of Sections 611-613 of the Internal Revenue Code of 1954 (1964 ed.) and 28 U.S.C. 2201 and 2282 are set forth in the Appendix, *infra*, pp. 9-13.

## STATEMENT

Petitioners Friedy B. Heisler, M.D., and her husband, Francis Heisler, brought this action against the United States, the local district director and the Commissioner of Internal Revenue, on behalf of themselves and a purported class consisting of those persons "who are employed, or self-employed, and support themselves

and their families by their labor, be it manual or otherwise," for a refund of taxes paid by them in the years 1964, 1965 and 1966. The complaint alleged that petitioners were entitled to a personal depletion allowance deduction under Sections 611-613 of the Internal Revenue Code of 1954, or, alternatively, that these provisions of the Code are unconstitutional [1] and that petitioners are entitled to a hearing on this issue before a three-judge court pursuant to 28 U.S.C. 2282 (R. 1-8).[2]

The complaint states that petitioner Friedy B. Heisler is a medical doctor engaged primarily in the private practice of psychiatry and that petitioner Francis Heisler is an attorney engaged in the private practice of law, and generally alleges that each has "natural deposits"—manifest as their respective abilities to earn a living—which "will be gradually depleted and in a forseeable [sic] time, will undoubtedly wholly disappear." (R. 2-3, 4.) They further alleged that to deny them a depletion allowance with respect to such natural deposits would constitute an arbitrary and invidious discrimination in violation of the Fifth Amendment. (R. 5-6, 8.) The complaint sets forth that administrative refund claims have been filed by petitioners and denied by the government. (R. 4, 5.)

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[1] Petitioners originally claimed a refund of 27½ percent of taxes paid (R. 4.) The prayer of the complaint is unclear with respect to precisely what alternative relief was requested, but the complaint was entitled "Complaint for Refund of Personal Depletion Allowance of Income Tax Paid and, in the Alternative, to Declare 26 U.S.C. 611, 612 and 613(b) (Depletion Allowance) Unconstitutional." (R. 1.)

[2] "R." references are to the duplicated record filed in the Ninth Circuit.

The district court denied petitioners' application to convene a three-judge court and granted the government's motion to dismiss. (R. 53.) The court of appeals affirmed, concluding that petitioners had not brought themselves within the depletion allowance provisions of the Code and that they lack standing to seek a declaration that these provisions are unconstitutional. (Pet. App. i-ii.)

## ARGUMENT

The decision below is correct, and there is no conflict of decisions or other ground for further review by this Court.

1. Petitioners' complaint failed to state a claim upon which relief could be granted. It has been well settled that deductions from gross income are matters of legislative grace which may be claimed only by bringing oneself within the scope of the applicable statutory provision. *Burnet* v. *Thompson Oil & G. Co.*, 283 U.S. 301; *New Colonial Co.* v. *Helvering*, 292 U.S. 435, 440; *Commissioner* v. *Southwest Exploration Co.*, 350 U.S. 308, 312.[4] The statutory provisions invoked by petitioners—Sections 611-613 of the Internal Revenue Code of 1954, Appendix, *infra*, pp. 9-13—provide for the deduction, in the case of "mines, oil and gas wells, other natural deposits, and timber", of "a reasonable allowance for depletion and for depreciation of improvements." These provisions cannot be reasonably construed to

[4] But see *Moritz* v. *Commissioner*, No. 71-1127, decided November 22, 1972, in which the Tenth Circuit allowed a dependent care deduction to a taxpayer who was not within the scope of the statutory language on the basis of its determination that the classification made in the statute was contrary to the "due process" clause of the Fifth Amendment.

provide for a deduction of a "human" or "personal" depletion allowance as claimed by petitioners. Contrary to their assertions (Pet. 14-15), nothing in the legislative history of these provisions indicates that Congress ever intended that they apply to any type of economic activity other than the extraction of physical natural resources from the land, for which some type of allowance is necessary to permit investors to recover their investment tax free as such resources are physically extracted and sold, and as the underlying investment is thereby depleted. See *United States* v. *Ludey*, 274 U.S. 295, 302; *Commissioner* v. *Southwest Exploration Co.*, *supra*, 350 U.S. at 312; and *Commissioner* v. *Brown*, 380 U.S. 563, 575-576.

Nor is there anything in the Constitution which would require Congress to extend the depletion allowance concept to all forms of economic activity alike, or to withhold it from all alike. It is settled that the uniformity required by Article I, Section 8, is merely geographic and not intrinsic—*i.e.*, that provision requires only that taxes apply in the same manner in all portions of the country and not that a uniform tax burden be placed on each individual taxpayer. *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 24.[4] Congress has broad power to choose the subjects of federal taxation and to

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[4] Nor does the Sixteenth Amendment require any greater uniformity in income taxes than does Article I, Section 8, in the case of duties, imposts and excises, as petitioners suggest. (Pet. 15.) Rather, that amendment merely empowers Congress to impose income taxes without regard to the requirement of Article I, Section 9, that all direct taxes be apportioned among the states on the basis of population. See *Brushaber* v. *Union Pac. R.R.*, *supra*, 240 U.S. at 16-18.

prescribe the distribution of the burden of a particular tax among persons subject to its taxing power. See *Brushaber, supra.* The requirement of "due process" of the Fifth Amendment requires no more than that the classification made by Congress pursuant to this broad taxing power not be unreasonable. *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 584; *United States* v. *Maryland Savings-Share Ins. Corp.,* 400 U.S. 4.

The depletion allowance provisions reflect a reasonable classification based on the nature of the economic activity engaged in by those entitled to claim it. See *United States* v. *Ludey, supra,* 274 U.S. at 302; *Commissioner* v. *Brown, supra,* 380 U.S. at 575; *United States* v. *Cannelton Sewer Pipe Co.,* 364 U.S. 76, 81. They embody no invidious discrimination against any person or group of persons. Indeed, the benefits of these provisions are available to all persons alike to the extent they are able to and do avail themselves of those provisions by investing in the extractive industries. Whether tax relief formally similar (or dissimilar) to the depletion allowance should be extended to income from personal endeavors and personal service is a matter for Congress alone.[8]

2. Petitioners' claim for alternative (declaratory) relief was properly dismissable for lack of jurisdiction, as well as on the merits. The federal courts have no general power to resolve constitutional questions in the

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[8] As petitioners suggest (Pet. 15-16), Congress once did provide an allowance in the case of "earned income" in the form of a 25 percent credit of the taxes which would otherwise be imposed on such income. See, *e.g.,* Section 31 of the Revenue Act of 1928, c. 852, 45 Stat. 804. This concept was not carried over into any subsequent tax legislation.

abstract, and—even assuming the existence of a justiciable case or controversy—28 U.S.C. 2201, Appendix, *infra*, p. 13, which grants the remedy of declaratory relief, explicitly does not extend to suits involving federal taxes. Moreover, petitioners lacked standing to raise the issue of the constitutionality of the depletion allowance in the context of a request for declaratory relief the effect of which would presumably be to deprive *other* taxpayers of the use of the statutory provisions in question, but which would not affect their own tax liability.[6]

3. The complaint does not by its terms seek injunctive relief. Accordingly, contrary to petitioners' objection (Pet. 20-21), there is no requirement under 28 U.S.C. Section 2282, Appendix, *infra*, p. 13, that the action be heard and determined by a district court of three judges. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 152-155. Moreover, a three-judge court is not required when the alleged constitutional claim is insubstantial. *Swift & Co.* v. *Wickham*, 382 U.S. 111, 115. Finally, since the district court lacked jurisdiction to decide the claim for declaratory relief on the merits, it was properly dismissed by a single judge court. *Abele* v. *Markle*, 452 F. 2d 1121, 1124 (C.A. 2).[7]

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[6] In *Flast* v. *Cohen*, 392 U.S. 83, relied on by petitioners (Pet. 17-19), a taxpayer was held to have standing to bring an action to restrain the government from making an allegedly unconstitutional expenditure in violation of the establishment of religion clause of the First Amendment. Nothing in *Flast* indicates that taxpayers have standing to challenge a provision which does not involve an expenditure, but which merely extends tax relief to others. See *Walz* v. *Tax Commission*, 397 U.S. 664.

[7] Petitioners' final objection (Pet. 21-23), that the courts below

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1973.

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failed to treat this case as a class action, is also without merit since the complaint does not state a claim upon which relief can be granted and since it has not been shown or alleged that any of the purported class have filed refund claims—a jurisdictional prerequisite to the maintenance of a refund suit (Section 7422(a), 1954 Code).

## APPENDIX

Internal Revenue Code of 1954 (26 U.S.C. (1964 ed.)):

### SEC. 611. ALLOWANCE OF DEDUCTION FOR DEPLETION.

(a) *General Rule.*—In the case of mines, oil and gas wells, other natural deposits, and timber, there shall be allowed as a deduction in computing taxable income a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under regulations prescribed by the Secretary or his delegate. For purposes of this part, the term "mines" includes deposits of waste or residue, the extraction of ores or minerals from which is treated as mining under section 613 (c). In any case in which it is ascertained as a result of operations or of development work that the recoverable units are greater or less than the prior estimate thereof, then such prior estimate (but not the basis for depletion) shall be revised and the allowance under this section for subsequent taxable years shall be based on such revised estimate.

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### SEC. 612. BASIS FOR COST DEPLETION.

Except as otherwise provided in this subchapter, the basis on which depletion is to be allowed in respect of any property shall be the adjusted basis provided in section 1011 for the purpose of deter-

mining the gain upon the sale or other disposition of such property.

SEC. 613 [as amended by Sec. 302(a), Public Debt and Tax Rate Extension Act of 1960, P.L. 86-564, 74 Stat. 290; Sec. 13(e), Revenue Act of 1962, P.L. 87-834, 76 Stat. 960 and Sec. 6(a), Act of September 2, 1964, P.L. 88-571, 78 Stat. 857.] PERCENTAGE DEPLETION.

(a) *General Rule.*—In the case of the mines, wells, and other natural deposits listed in subsection (b), the allowance for depletion under section 611 shall be the percentage, specified in subsection (b), of the gross income from property excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 percent of the taxpayer's taxable income from the property (computed without allowance for depletion). For purposes of the preceding sentence, the allowable deductions taken into account with respect to expenses of mining in computing the taxable income from the property shall be decreased by an amount equal to so much of any gain which (1) is treated under section 1245 (relating to gain from disposition of certain depreciable property) as gain from the sale or exchange of property which is neither a capital asset nor property described in section 1231, and (2) is properly allocable to the property. In no case shall the allowance for depletion under section 611 be less than it would be if computed without reference to this section.

(b) *Percentage Depletion Rates.*—The mines, wells, and other natural deposits, and the percentages, referred to in subsection (a) are as follows:

(1) *27½ percent*—oil and gas wells.

(2) *23 percent*—

(A) sulfur and uranium; and

(B) if from deposits in the United States—anorthosite (to the extent that alumina and aluminum compounds are extracted therefrom), asbestos, bauxite, celestite, chromite, corundum, fluorspar, graphite, ilmenite, kyanite, mica, olivine, quartz crystals (radio grade), rutile, block steatite talc, and zircon, and ores of the following metals: antimony, beryllium, bismuth, cadmium, cobalt, columbium, lead, lithium, manganese, mercury, nickel, platinum and platinum group metals, tantalum, thorium, tin, titanium, tungsten, vanadium, and zinc.

(3) *15 percent*—

(A) metal mines (if paragraph (2)(B) does not apply), rock asphalt, and vermiculite; and

(B) if paragraph (5)(B) does not apply, ball clay, bentonite, china clay, sagger clay, and clay used or sold for use for purposes dependent on its refractory properties.

(4) *10 percent*—asbestos (if paragraph (2)(B) does not apply), brucite, coal, lignite, perlite, sodium chloride, and wollastonite.

(5) *5 percent*—

(A) gravel, mollusk shells (including clam shells and oyster shells), peat, pumice, sand, scoria, shale, and stone, except stone described in paragraph (6);

(B) clay used, or sold for use, in the manufacture of building or paving brick, drainage and roofing tile, sewer pipe, flower pots, and kindred products; and

(C) if from brine wells—bromine, calcium chloride, and magnesium chloride.

(6) *15 percent*—all other minerals (including, but not limited to, aplite, barite, borax, calcium carbonates, diatomaceous earth, dolomite, feldspar, fullers earth, garnet, gilsonite, granite, limestone, magnesite, magnesium carbonates, marble, phosphate rock, potash, quartzite, slate, soapstone, stone (used or sold for use by the mine owner or operator as dimension stone or ornamental stone), thenardite, tripoli, trona, and (if paragraph (2)(B) does not apply) bauxite, flake graphite, fluorspar, lepidolite, mica, spodumene, and talc, including pyrophyllite), except that, unless sold on bid in direct competition with a bona fide bid to sell a mineral listed in paragraph (3), the percentage shall be 5 percent for any such other mineral when used, or sold for use, by the mine owner or operator as rip rap, ballast, road material, rubble, concrete aggregates, or for similar purposes. For purposes of this paragraph, the term "all other minerals" does not include—

(A) soil, sod, dirt, turf, water, or mosses; or

(B) minerals from sea water, the air, or similar inexhaustible sources.

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28 U.S.C.:

§ 2201. *Creation of remedy.*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2282. *Injunction against enforcement of Federal statute; three-judge court required.*

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

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